

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AUXIER FINANCIAL GROUP LLC,

Plaintiff,

v.

JP MORGAN CHASE BANK, N.A.; Bank of
America N.A. as Successor by Merger to
LASALLE BANK N.A. as TRUSTEE for
Washington Mutual Mortgage Pass-through
Certificates WaMu Series 2007-OA4 Trust, and
for Washington Mutual Mortgage Pass-Through
Certificates MWALT Series 2007 OC-1 Trust,

Defendants.

No. C10-2070 MJP

REPLY IN SUPPORT OF
DEFENDANTS' UNOPPOSED
MOTION FOR SUMMARY
JUDGMENT

***Note on Motion Calendar:
Friday, December 30, 2011***

I. INTRODUCTION

Defendants moved for summary judgment on December 8, 2011, noting the motion for consideration on Friday, December 30, 2011. *See* Dkt. 22. The deadline for Plaintiff to file opposition papers was Tuesday, December 27, 2011. Local Rule W.D. Wash. 7(d)(3); Fed. R. Civ. P. 6(a)(1)(C), 6(a)(6)(A). Plaintiff did not file opposition papers on December 27, 2011.

II. ARGUMENT

The Court should view Plaintiffs' failure to file papers in opposition as an admission that the Motion has merit and should therefore grant Defendants' motion and enter summary judgment in Defendants' favor. *See* Local Rules W.D. Wash. 7(b)(2); *Yarcho v. City of*

1 *Issaquah*, 2011 WL 806591, *1 (W.D. Wash. 2011) (Pechman, J.) (granting summary
 2 judgment as a result of non-opposition pursuant to Local Rule W.D. Wash. 7(b)(2)).
 3 *Greenwood v. FAA*, 28 F.3d. 971, 977 (9th Cir. 1994) (“Judges are not like pigs, hunting for
 4 truffles buried in briefs”); *Lekas v. Briley*, 405 F.3d 602, 614-15 (7th Cir. 2005) (“our judges
 5 are busy people” and “given plausible reasons for dismissing a complaint, they are not going to
 6 do the plaintiff’s research and try to discover whether there might be something to say against
 7 the defendants’ reasoning”).

8 Moreover, because the motion was one for summary judgment, Plaintiff could not rest
 9 on the allegations of its Complaint. “[T]he plain language of Rule 56(c) mandates the entry of
 10 summary judgment, after adequate time for discovery and upon motion, against a party who
 11 fails to make a showing sufficient to establish the existence of an element essential to that
 12 party’s case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v.*
 13 *Catrett*, 477 U.S. 317, 322 (1986). Once the moving party has shown the absence of a disputed
 14 issue of fact, it is entitled to summary judgment if the non-moving party fails to present, by
 15 affidavits, depositions, answers to interrogatories, or admissions on file, “specific facts showing
 16 that there is a genuine issue for trial.” *Id.* at 324. In fact, “the moving party may simply point
 17 to the absence of evidence to support the nonmoving party’s case.” *In re Brazier Forest Prod.*
 18 *Inc.*, 921 F.2d 221, 223 (9th Cir. 1990). The non-movant may not rest on the allegations of the
 19 pleadings, but ***must produce specific facts showing a genuine issue.*** *Kaiser Cement Corp. v.*
 20 *Fischbach & Moore, Inc.*, 793 F.2d 1100, 1103-04 (9th Cir. 1986).

21 Regardless, the Court should grant Defendants’ motion for two separate reasons:

22 ***First***, Plaintiff has no interest in the property at issue in this lawsuit and thus lacks
 23 standing to bring these claims at all. *See* Def. Mot. [Dkt. 22] at pp. 6-14. The owners of the
 24 property are the parties to the Deed of Trust (Joe Sellars and Greg Greene), who have owned
 25 the property since 2007, and who both agree that Plaintiff has no interest in the property. *Id.*

26 ***Second***, Plaintiff’s claims fail either as a matter of law or because Plaintiff has no
 27 evidence to support the essential elements of its claims. *See id.* pp. 14-24. Because Chase has

1 held the underlying Note (endorsed in blank) during all relevant time periods (as the agent for
 2 the relevant Trust), it has been the holder with the right to foreclose, making the earlier
 3 assignment raised by Plaintiff a harmless error that has in no way prejudiced anyone (let alone
 4 Plaintiff, a stranger to the Note and Deed of Trust). *Id.* at pp. 15-17. Likewise, Plaintiff cannot
 5 bring a claim for wrongful foreclosure, as Washington does not recognize a cause of action for
 6 the wrongful initiation of foreclosure. *Id.* at pp. 17-18. Similarly, Plaintiff has no evidence
 7 supporting a slander of title claim. *Id.* at 18-19. Finally, Plaintiff has no evidence supporting
 8 the elements of its CPA claim, *id.* at 19-22, nor can it offer evidence justifying an award of
 9 injunctive or declaratory relief. *Id.* at 22-24.

10 III. CONCLUSION

11 Plaintiff lacks standing to bring claims against Defendants because Plaintiff does not
 12 have **any** ownership or possessory interest in the Property. But even if Plaintiff had standing, it
 13 has no evidence supporting the essential elements of its claims. Plaintiff's claims thus fail and
 14 the Court should enter summary judgment in favor of Defendants.

15 DATED this 28th day of December, 2011.

17 Davis Wright Tremaine LLP
 Attorneys for Chase and Bank of America

18
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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that on December 28, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

- Edward L. Mueller
elm@muellerlawfirm.net

DATED this 28th day of December, 2011.

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